STATE OF MICHIGAN

COURT OF APPEALS

ROBERT BARNETT, Personal Representative of the Estate of EVELYN Barnett, Plaintiff-Appellee/Cross-Appellant, v MATTHEW JOHN MCELROY, Defendant, and AUTO OWNERS INSURANCE COMPANY and HOME OWNERS INSURANCE COMPANY, Defendants-Appellants/Cross-Appellees.	UNPUBLISHED August 2, 2007 No. 267836 Oakland Circuit Court LC No. 2003-046892-NF

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Defendants Home-Owners Insurance Company and Auto-Owners Insurance Company appeal the jury's verdict in favor of plaintiff, Robert Barnett, Personal Representative of the Estate of Evelyn Barnett, on plaintiff's intentional infliction of emotional distress claim and its award of exemplary damages. Plaintiff cross-appeals the jury's failure to award her wage loss benefits. For the reasons set forth below, we affirm in part, reverse in part, and remand for correction of the judgment.

I. Facts and Procedural History

After Evelyn Barnett was hit by a car, she applied for benefits under an insurance policy issued by Home-Owners Insurance Company. Because of the severity of Ms. Barnett's injuries, defendants assigned a case manager to coordinate her care and rehabilitation. Defendants paid Preferred Case Management for management services, whose employee Marie Foldvary, a registered nurse, was assigned to Ms. Barnett's case.

Ms. Barnett filed this action on January 22, 2003, and alleged that the defendant insurance companies withheld or delayed payment of uninsured motorist benefits, lost wages,

medical expenses, and attendant care expenses. For reasons unrelated to the car accident, Ms. Barnett died on October 27, 2003, and her son, Robert Barnett ("plaintiff"), took over the case as the personal representative of Ms. Barnett's estate. Plaintiff later amended the complaint to add a claim against defendants for intentional infliction of emotional distress.

The trial court denied defendants' motion for directed verdict on plaintiff's intentional infliction of emotional distress claim and the jury returned a verdict in favor of plaintiff and also awarded exemplary damages.[1] The jury denied that Ms. Barnett lost income from work and, therefore, rejected her claim for wage loss benefits.

II. Intentional Infliction of Emotional Distress

Defendants contend that the trial court should have granted their motion for directed verdict or judgment notwithstanding the verdict (JNOV) on plaintiff's intentional infliction of emotional distress claim.[2]

Our Supreme Court has yet to recognize the tort of intentional infliction of emotional distress, much less whether it may apply in a case arising under the no-fault act, the purpose of which was to abolish tort liability in motor vehicle accident cases.[3] See *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004). This Court has recognized the tort in two cases that are not binding on us, *Atkinson v Farley*, 171 Mich App 784, 790-791; 431 NW2d 95 (1988) (workers' compensation insurer) and *McCahill v Commercial Union Ins Co*, 179 Mich App 761; 446 NW2d 579 (1989) (home insurer). See MCR 7.215(J)(1). But our Supreme Court explicitly declined to adopt the tort in a no-fault case, *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985). In *Roberts*, however, the Court outlined what *does not* constitute outrageous conduct by an insurer in processing a claim. Nonetheless, we need not decide whether the tort applies here because, as in *Roberts, supra* at 597, plaintiff "failed even to meet the threshold requirements of proof to make out a prima facie claim of intentional infliction of emotional distress . . . ."

Because plaintiff presented insufficient evidence that defendants' conduct was "outrageous" or that Ms. Barnett suffered "severe emotional distress," plaintiff's claim should not have been submitted to the jury. "To establish a prima facie claim of intentional infliction of

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[1] The jury awarded plaintiff $300,000 in uninsured motorist benefits and that award is not disputed here.

[2] "This Court reviews de novo a trial court's decision regarding a party's motion for a directed verdict." *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). "This Court will 'view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed.' " *Id*. at 428, quoting *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002).

[3] The exception is those cases that meet the threshold of serious impairment of a body function. *Kreiner, supra*.

emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004). "The threshold for showing extreme and outrageous conduct is high." *Roberts, supra* at 603. "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). Further, to succeed in showing that the plaintiff has suffered "severe emotional distress," evidence must establish that "the distress inflicted is so severe that no reasonable man could be expected to endure it." *Roberts, supra* at 608-609 (emphasis deleted), quoting Restatement Torts, 2d, § 46, comment j, p 77.

At trial, plaintiff presented evidence that the case manager, Ms. Foldvary, often attended Ms. Barnett's doctors' appointments. Evidence also showed that Ms. Barnett asked Ms. Foldvary not to attend some of her appointments and she told the claims adjuster and Ms. Foldvary that she did not want Ms. Foldvary to be present in the examination rooms at her appointments. Ms. Barnett also rescheduled appointments and purposely failed to tell Ms. Foldvary about some of her doctors' appointments. Plaintiff presented further evidence that Ms. Foldvary used Ms. Barnett's signed authorization form to obtain her medical records, even after Ms. Barnett instructed her doctors not to share any information with Ms. Foldvary or the insurance company. The record further reflects that, at least twice, the claims adjuster for defendants called Ms. Barnett to explain that she must comply with defendants' claims policies in order to recover benefits under her insurance policy. Plaintiff also presented testimony that Ms. Barnett was disgusted, upset, and frustrated with Ms. Foldvary. On one occasion, Ms. Barnett became "violently angry" with her son and cried when she discussed her frustration about Ms. Foldvary.

Again, the trial court erred when it failed to grant defendants' motion for directed verdict on this issue because a reasonable juror could not conclude that Ms. Foldvary's conduct was extreme and outrageous or that Ms. Barnett suffered severe emotional distress. While Ms. Foldvary's conduct was insistent and, at times, intrusive, it does not rise to a level that is "utterly intolerable in a civilized community." *Roberts, supra*, at 603. Her efforts to obtain information, while they may have led to an intrusion upon Ms. Barnett's sense of privacy, cannot be fairly characterized as "atrocious" or "beyond all possible bounds of decency." *Id.* Thus, while a reasonable juror could conclude that Ms. Foldvary was overly assertive, the threshold is much higher: a reasonable juror could not conclude that Ms. Foldvary's conduct was extreme and outrageous for purposes of a claim for intentional infliction of emotional distress.

Furthermore, Ms. Barnett's references to her dismay about Ms. Foldvary were limited and evidence simply did not establish that she suffered a level of distress that was so acute or prolonged as to justify recovery. *Haverbush v Powelson*, 217 Mich App 228, 235; 551 NW2d 206 (1996). Simply put, though Ms. Barnett expressed some grief over the course of her recovery, the evidence presented would not allow a reasonable juror to conclude that Ms. Barnett's distress was "so severe that no reasonable man could be expected to endure it." *Roberts, supra* at 608-609.

Accordingly, the trial court should not have submitted plaintiff's intentional infliction of emotional distress claim to the jury and we vacate the jury's verdict on this issue.[4]

III. Wage Loss Benefits

As noted, the jury returned a verdict in defendants' favor on plaintiff's wage loss claim and plaintiff cross-appeals the trial court's failure to grant his motion for JNOV. This Court "reviews de novo the trial court's decisions on a motion for . . . JNOV." *Diamond v Witherspoon*, 265 Mich App 673, 681; 696 NW2d 770 (2005). As the Court in *Diamond* further explained:

> In reviewing the decision on a motion for JNOV, this Court views the testimony and all legitimate inferences drawn from the testimony in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). [*Diamond, supra* at 682.]

MCL 500.3107(1)(b) provides that personal protection insurance benefits are available for "[w]ork loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." The parties agreed to, and the trial court gave, the following instruction to the jury on plaintiff's work loss benefits claim:

> [P]laintiff has the burden of proof on each of the following.
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> ***
>
> That Evelyn Barnett suffered a work loss which consists of loss of income from work the plaintiff would have performed during the first three years after the accident had she not been injured.
>
> That the defendant failed to pay any or all of said benefits.
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> ***
>
> If you decide no-fault benefits are owed to Evelyn Barnett, you are instructed to award benefits that have not already been paid by the defendant as follows:
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> ***

[4] Because plaintiff was not entitled to any damages for intentional infliction of emotional distress, the award of exemplary damages is also vacated and we need not decide whether exemplary damages are recoverable or whether the award was duplicative of the compensatory damages award.

> B. Work loss benefits consisting of 85 percent of the loss of income from work that the plaintiff would have performed during the first three years after the date of the accident if she had not been injured. Total work loss benefits for any 30-day period cannot exceed $920.83.

Evidence established that, after the accident, Ms. Barnett continued to receive the same pay as before the accident. The verdict form reveals that the jury concluded that plaintiff did not lose income from work that she would have performed had she not been injured in the accident. Accordingly, the jury did not award plaintiff any wage loss benefits.

Though plaintiff now contends that the jury should have awarded lost wages regardless whether Ms. Barnett continued to receive her former salary, plaintiff specifically agreed to the instruction the trial court gave to the jury, and the instruction conforms with the plain language of MCL 500.3107(1)(b). The statute contemplates a "loss of income from work" and the continued payment of a salary or wages compels the conclusion that there was no "loss of income." Because plaintiff agreed to the jury instruction, and because reasonable jurors could conclude that Ms. Barnett did not lose wages because of the accident, the trial court correctly denied plaintiff's motion for JNOV.

IV. Order of Judgment

Plaintiff moved to correct the order of judgment because plaintiff's counsel inadvertently failed to include Home-Owners Insurance Company as a defendant. Notwithstanding that defendants agreed with plaintiff and, in fact, filed their own motion arguing that Home-Owners is the proper defendant, the trial court declined to grant the request. In contrast to their position below, defendants now argue that this Court should not alter the judgment.

MCR 2.612(A) provides that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it." Generally, this Court reviews a decision pursuant to MCR 2.612 for an abuse of discretion. *Detroit Free Press, Inc v Department of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999).

It is undisputed that Ms. Barnett's insurance policy was issued by Home-Owners, not Auto-Owners. Indeed, Ms. Barnett's insurance policy is clearly labeled with the Home-Owners name. Nonetheless, throughout the trial, the attorneys and witnesses virtually always referred to the defendant as Auto-Owners. As plaintiff notes on appeal, this may be because Auto-Owners and Home-Owners have common ownership and management, which is clear because witnesses who claimed to be Auto-Owners employees were the ones who oversaw and adjusted Ms. Barnett's Home-Owners Insurance claim.

The record also reflects that, despite the error in the judgment, Home-Owners was always listed as a defendant in this litigation. Plaintiff filed her complaint against both companies and both Auto-Owners and Home-Owners were represented by the same attorneys and they filed all motions, responses, and other documents together. Accordingly, it was appropriate to correct the clerical error to include Home-Owners as a judgment defendant. Moreover, because the only

remaining award is for uninsured motorist benefits under the insurance policy issued by Home-Owners, it would be appropriate to list Home-Owners as the judgment defendant.

Affirmed in part, reversed in part, and remanded for correction of the judgment. We do not retain jurisdiction.

/s/ Henry William Saad